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 10                  Profit Sharing Plan

E-Filed: September 3, 2013

6                   **UNITED STATES BANKRUPTCY COURT**

7                   **FOR THE DISTRICT OF NEVADA**

8                   In Re:  
 9                   **WILLIAM GAYLER,**  
 10                  Debtor.

Case No.:        Bk-S-09-31603-MKN  
 Chapter:         7  
 Hearing Date:   September 4, 2013  
 Hearing Time:   3:00 p.m.

11                  **SECOND DECLARATION OF PHILLIP S. AURBACH**

12                  I, Phil Aurbach, am submitting the following facts in support of Marquis Aurbach  
 13 Coffing's (Maclaw's<sup>1</sup>) Opposition to Motion to Disqualify. I have personal knowledge, unless  
 14 stated otherwise, and am competent to testify to the following facts:

15                  I.        **INTRODUCTION**

16                  1.        Background. Mr. Gayler made a lot of money creating entities<sup>2</sup> (usually limited  
 17 liability companies ("LLCs")), buying real property for the various LLCs, managing and  
 18 controlling the LLCs, and, as manager, deciding when to sell the property (usually at a profit)  
 19 subject to the requisite member approval. Mr. Gayler would own a percentage of each LLC,  
 20 sometimes individually or through another entity. I believe I had invested with Mr. Gayler, in  
 21 three or 4 of limited liability companies that Gayler manages: Polyrus, LLC 5% (which may  
 22 own some of Sunset III); Sunset 8, LLC 2.5%; and Sunset V, LLC 20%. Mr. Gayler's business  
 23 plan worked well until the real estate downturn. Then, in 2008 and 2009, creditors started suing  
 24  
 25

26                  <sup>1</sup> Maclaw has approximately 40 lawyers located in two buildings in Las Vegas.

27                  <sup>2</sup> On June 29, 2010, Gayler listed 69 entities on his Schedule B (Dkt# 105).

1 Gayler.<sup>3</sup> According to his 2004 examination, Gayler saw the downturn in the economy coming  
 2 in 2008 and 2009.<sup>4</sup>

3       2. Mr. Hayes, another shareholder at Maclaw, had an attorney-client relationship  
 4 with several creditors/investors of Mr. Gayler, John O'Brien, Don Campbell and Colby Williams  
 5 (all attorneys) as well as Barry Moore and a few others (referred to herein as "Maclaw Creditors")  
 6 of Mr. Gayler). Dale Hayes represented these Maclaw Creditors in a state court lawsuit where he  
 7 was attempting to invalidate unauthorized loans entered into by Mr. Gayler and stop foreclosures  
 8 pending against property owned by CH Angelus, LLC ("Angelus I"), CH Angelus II, LLC  
 9 ("Angelus II") and Ch. Angelus IV, LLC ("Angelus IV").

10       3. On November 16, 2009<sup>5</sup> an involuntary Bankruptcy was filed against Mr. Gayler.

11       4. One of Dale Hayes' clients, John O'Brien, who I had known since 1977 when I  
 12 started practicing law, passed me in the hallway of one of Maclaw's buildings and told me that  
 13 Mr. Gayler was about to receive over \$100,000, which he believed were assets of the estate, and  
 14 asked if there was any way I could contact Mr. Lisowski to get that money for the bankruptcy  
 15 estate instead of allowing it to go to Mr. Gayler. I contacted Mr. Lisowski, and he suggested I  
 16 get appointed as Special Counsel to help get assets into the bankruptcy estate.

17       5. In April 2011, I applied and on May 23, 2011,<sup>6</sup> I was appointed Special Counsel  
 18 to James Lisowski, (former) trustee of the above-captioned bankruptcy estate, to recover,  
 19 preserve, and protect assets of the bankruptcy estate (the "Estate") for a 1/3 contingency fee.<sup>7</sup>

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20       <sup>3</sup> The Involuntary Bankruptcy Petition was filed November 17, 2009 (Dkt# 1), and lists three judgment  
 21 creditors of Gayler totaling \$819,170.

22       <sup>4</sup> See Exhibit 1 (October 3, 2011 2004 Examination of William Gayler) at 26–30.

23       <sup>5</sup> Dkt# 1.

24       <sup>6</sup> Dkt# 205.

25       <sup>7</sup> My duties were to assist and advise the trustee regarding potential fraudulent conveyance and preference  
 26 actions, including but not limited to preparing adversary complaints, conduct discovery, prepare motions,  
 27 provide support services including 1) instituting or defending adversary proceeding or contested matters  
 in which the Trustee is a party, 2) to assist in recovery, protecting and preserving assets for the estate, and  
 to advise the trustee with other necessary legal services. See Doc 192 Application entered 4/14/11 and  
 Order Doc 205 entered 5/23/11.

1 When I applied to be Special Counsel in May 2011, I did not perceive a conflict since I was  
 2 going after assets owned by Gayler, individually, pre-bankruptcy, usually fraudulent transfers, to  
 3 bring them into the estate. On the other hand, the Maclaw creditors were suing to invalidate  
 4 unauthorized loans entered into by Gayler as Managing Member on behalf of non-bankrupt  
 5 entities, Angelus I, Angelus II and Angelus IV. Part of the purpose of the Maclaw creditors'  
 6 lawsuits was to stop foreclosures relating to fraudulent deeds of trust against property owned by  
 7 Angelus I, Angelus II and Angelus IV. These entities were not owned by Mr. Gayler. Mr.  
 8 Gayler only claimed to hold membership interests in these entities. If Angelus I, Angelus II and  
 9 Angelus IV were successful in saving the investment property, Gayler's membership interests  
 10 would not be wiped out through foreclosure. If the Maclaw creditors were not successful, Mr.  
 11 Gayler would have no ownership interest to claim in Angelus I, Angelus II, or Angelus IV  
 12 because the investment properties would be gone. Thus, the interests of the Maclaw creditors  
 13 and the bankruptcy estate were aligned – save the investment properties. There was no conflict.

14       6. Orderly Administration of the Estate. Mr. Rosenberg claims that I have prevented  
 15 an orderly administration of the Gayler estate. This is incorrect. Mr. Rosenberg ignores the fact  
 16 that all of the entities that Gayler managed were owned by TGF Holdings. None of them are part  
 17 of Mr. Gayler's bankruptcy estate. Mr. Rosenberg is the trustee of CH Angelus II which is a  
 18 creditor of the Gayler estate in which he is the trustee as well. He conveniently separates those  
 19 two for purposes of his administration and fiduciary duties to both sets of creditors, but forgets  
 20 that Sunset V as well as the CH Angelus entities are not assets of Mr. Gayler.

21       7. Sunset V, LLC

22       Paragraph	23       8     --     Rosenberg's	24       My response.
25       Declaration.		
26       Mr. Rosenberg states in his August 28, 27       2013 declaration Dkt# 556 that in our first meeting I "let it slip" that I was an investor in one of the Gayler entities.		I told Mr. Rosenberg this fact. "Let it slip" sounds like I was hiding something. There was nothing to hide.

1 Rosenberg went on to say that he didn't 2 understand how I could represent the 3 estate "when he had a personal 4 pecuniary interest in the outcome of 5 some of the very same property 6 disputes that we were litigating in 7 bankruptcy."	Sunset V was not a Gayler bankruptcy asset. Gayler's approximate 10% interest in Sunset V had been transferred to TGF Holdings, a limited Partnership. Sunset V owned real property. When it was sold, the net proceeds were distributed to the owners based upon their ownership regardless of Gayler's bankruptcy.
8 Finally, Mr. Rosenberg said that I was 9 defensive and implied that because I 10 was on a contingency, the estate was 11 not being harmed. 12	Mr. Rosenberg is mistaken. I was not defensive, and didn't slough off his comment because I was on a contingency. However, I could not believe his attack on me and my firm when I worked so hard to recover almost \$700,000 in assets for the estate.

13           **8. The Settlement Agreement**

14 <b>Paragraphs 9 &amp; 10 — Rosenberg</b>	15 <b>Declaration.</b>	16 <b>My response.</b>
16           Mr. Rosenberg states in his August 28, 17           2013 declaration Dkt# 556 that 18           "According to Aurbach, the Former 19           Trustee did not see much value in the 20           case because the largest creditor was 21           the IRS and there was unlikely to be 22           any distribution to general unsecured 23           creditors. Aurbach also indicated that 24           the former Trustee had, for lack of a 25           better word, abdicated control and 26           decision making authority for the case 27           to him."		Although the IRS is the largest creditor, I did not say these things to Rosenberg. Mr. Lisowski knew that I had experience in pre judgment remedies and fraudulent transfers, so he gave me much responsibility to track down assets. It is not correct that Lisowski "abdicated control and decision making" nor did Lisowski give me complete authority regarding settlement.  Mr. Lisowski was aware of and was involved in settlement discussions.

1	Mr. Rosenberg states that the two sides	When the creditors unanimously rejected the
2	were within \$20,000 of a mutually	settlement proposal, I went back into the litigation
3	agreeable number that could be paid to	mode preparing several motions for summary
4	Gayler in cash as part of the settlement;	judgment. I did not unilaterally end settlement
5	yet, Aurbach told me he unilaterally	discussions.
6	ended settlement discussions	
7	Mr. Aurbach had an intense emotional	My emotional state relative to Mr. Gayler was
8	dislike for Gayler and his unwillingness	disbelief. I could not believe that someone could
9	to accept blame for a series of poor	get away with stealing millions of dollars from a
10	decisions by Maclaw that carried	bankruptcy estate and get away with it. The
11	excessive legal costs and seemed to	negative rulings mentioned by Mr. Rosenberg were
12	only result in negative rulings affecting	attempts to shortcut the proceedings by bringing
13	the recovery of assets for the estate.	Mr. Gayler's fraudulent transfers to the Court by
14		motion instead of by adversary proceedings. This
15		was corrected. There were never any excessive
16		legal costs to the estate.

#### 9. CH Angelus I and CH Angelus II

18	Paragraphs	13-18—Rosenberg	19	My response.
20	Declaration.	Mr. Rosenberg states in his August 28,	21	The CH Angelus I and CH Angelus II lawsuits in
21	2013 declaration Dkt# 556 that he	22	state court were intended to halt foreclosures under	
22	asked Jessica Goodey, my associate,	23	fraudulent deeds of trust and to declare the	
23	what participation the bankruptcy estate	24	unauthorized loans entered into by Mr. Gayler null	
24	had in the state court proceedings to	25	and void. On behalf of the Maclaw creditors, Dale	
25	protect the bankruptcy estate's interest	26	Hayes and Liane Wakayama were successful. Mr.	
26	in the proceeds because Maclaw had	27	Gayler's membership interests in these entities were	
27	not filed anything in state court to stay	28	not part of the bankruptcy estate. Additionally, Mr.	

1	the state court proceedings.	2 3 4 5 6 7 8 9 10 11	Gayler transferred his membership interests to TGF Holdings limit Partnership which was not an asset of the bankruptcy estate. Not only didn't the Trustee have standing to intervene in the state court proceedings, there was no reason for the Trustee to get involved and take a position adverse to the Maclaw creditors as the goal was to save the investments. Any interest that Mr. Gayler owned pre-bankruptcy in these entities needs to be resolved in the future.
12	On November 14, 2012 Dale Hayes and Liane Wakayama filed a Motion to Lift Stay on behalf of Maclaw creditors to allow the state court to strip Gayler of any membership interests he owns in CH Angelus or CH Angelus II.  Mr. Aurbach did not oppose that motion. I believe this was part of a larger pattern being orchestrated by Maclaw to selectively remove assets from the estate and liquidate them outside of bankruptcy.	13 14 15 16 17 18 19 20 21 22 23	It is true that the Motion to Lift Stay has yet to be decided. As Special Counsel, I did not oppose the Motion because it was in the Former Trustee's business judgment that the Maclaw creditors should bear the expense and time of arbitrating the issue. This created a potential conflict, but there was no actual conflict.

24           **10. Benefit to Maclaw Creditors**

25	<b>Paragraphs</b>	<b>19-22—Rosenberg</b>	<b>My response.</b>
26	<b>Declaration.</b>		
27	Mr. Rosenberg states in his August		The generalized waste of time described by Mr.

**MARQUIS AURBACH COFFING**

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<p>1 28, 2013 declaration Dkt# 556 that an      2 enormous amount of time and energy      3 had been wasted by Maclaw and this      4 waste of time gave Maclaw an excuse      5 to go after real assets—the assets      6 Maclaw Creditors were pursuing in      7 state court.</p>	<p>Rosenberg was:      1) using 2004 exams to obtain thousands of bank      and tax documents to follow Mr. Gayler's cash      which bypassed the bankruptcy estate, and      2) several motions which tried to get Mr. Gayler's      assets into the bankruptcy estate without the need of      an adversary proceeding. Although I thought a      motion was proper, this court thought such action      should be brought by an adversary proceeding,      which we drafted and filed.      3) each of Mr. Gayler's transactions was      tremendously complex and time-consuming.</p> <p>In my opinion Mr. Rosenberg has no basis for      claiming that I wasted any amount of time. In any      event, it makes no sense to say that my efforts      somehow gave Maclaw Creditors an "excuse" to go      after "the real assets" – whatever that means.</p>
<p>18 Mr. Rosenberg makes many      19 generalizations that Maclaw made      20 numerous mistakes, arguments had      21 been overlooked, prejudicial errors      22 were made and he concludes that these      23 errors were intentional.</p>	<p>I did NOT make mistakes to intentionally      benefit Maclaw Creditors. I was trying to find      where Mr. Gayler hid millions of dollars. For      example, his custom home went into foreclosure      before his bankruptcy then, after a friendly      foreclosure, it sold after the bankruptcy for \$7      Million. The home was in 23 Golden Sunray, LLC      which was owned by TGF Holding. We tried to      pursue these claims, but again ran into problems      because neither Mr. Gayler nor the estate owned 23</p>

	Golden Sunray, LLC which held the claims for relief.
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3           **11. Benefit to Maclaw Creditors**

4 <b>Paragraphs</b>	5 <b>23-29—Rosenberg</b>	6 <b>My response.</b>
7	<b>Declaration.</b>	
8	Mr. Rosenberg claims he “laid his cards on the table” by telling all of the attorneys his concerns that the estate had been compromised by the lack of representation in state court.	Two days after his appointment, Mr. Rosenberg met with Ms. Goodey and me on December 14, 2012. During this meeting, Mr. Rosenberg brought to my attention that he knew Mr. Hayes represented some of Gayler’s creditors. Therefore, prior to the February 4, 2013 meeting, Mr. Rosenberg knew that some attorneys at MAC represented creditors.
9	Additionally, “had I known that some of the attorneys in the room would someday be adverse to the estate, I would not have talked so openly.”	At the February 4, 2013 meeting, the communications were a one-way street where MAC attorneys were bringing Mr. Rosenberg and his counsel, Mr. Kim, up to speed. Everything discussed in relation to the \$413,000 is a matter of public record. Certainly Mr. Rosenberg and I did not discuss any strategies regarding the future distribution of those funds.
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21	Rosenberg says that he demanded that Maclaw disclose every attorney who had any relationship with Gayler, and that Aurbach did not appreciate my tone and told me that Maclaw would quit. “I thought Aurbach was overreacting and his behavior did not	I did have an attitude toward Mr. Rosenberg. We just couldn’t have a rational discussion about the law and facts. Mr. Rosenberg would continuously overlook the almost \$700,000 I had sequestered and brought into the estate, and he instead claimed that we should be taking action that had no basis in law. Plus, Mr. Rosenberg had hired
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1 2 3 4 5 6 7 8 9	give me confidence that Maclaw was competent."	Howard Kim as his attorney. I did not believe I could represent Mr. Rosenberg because of our divergent views of who the bad guy was and how the litigation should be handled. I thought Gayler's fraud should be the focus. Mr. Rosenberg thought Maclaw and I should be the focus. Since his appointment, Mr. Rosenberg was further focused on settling with Mr. Gayler no matter if the creditors approve the settlement terms or not.
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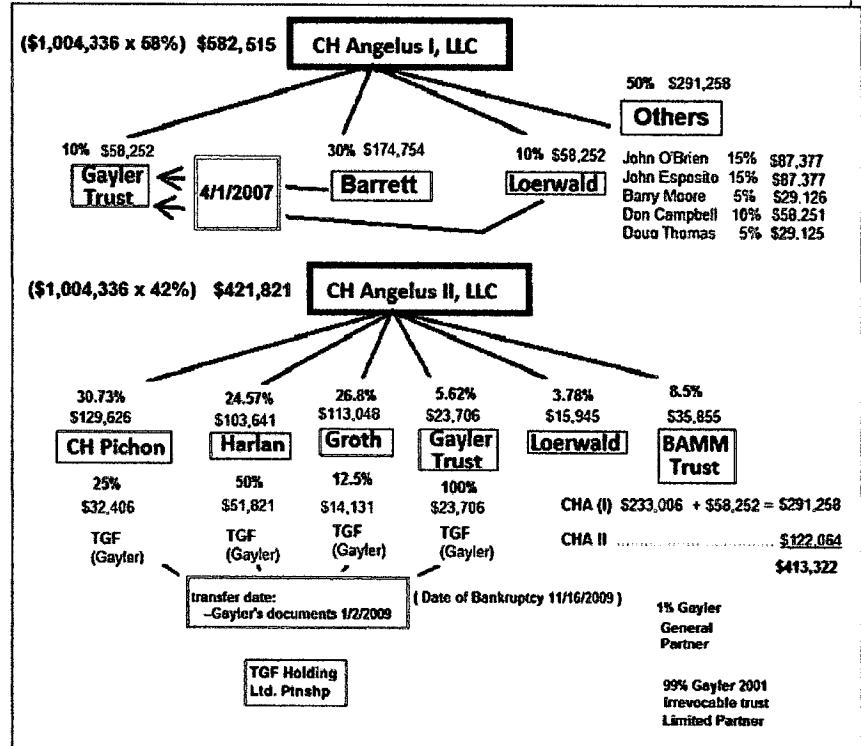
10           **12. Settlement**

11 12 Paragraphs <b>Declaration.</b>	13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28
<b>30-38—Rosenberg</b>	Mr. Rosenberg states in his August 28, 2013 declaration Dkt# 556 that Mr. Kim asked Mr. Hayes how he could be serving two masters.	Mr. Hayes had been representing the Maclaw Creditors for years attempting to stop the foreclosures, to rectify the harm caused by Gayler's self-dealing and fraud, and to save the investments. It took a slide show to explain how Gayler committed his fraud on the Maclaw creditors with undisclosed deeds of trust and how he hid assets from his bankruptcy by fraudulent transfers of over 40 membership interests. There were not two masters. I was going after assets that should be assets of the estate. Mr. Hayes was attempting to stop foreclosures against entities and save assets, which were not part of the bankruptcy estate.

1 Mr. Rosenberg claims that at that  
 2 February meeting he first learned that  
 3 **Gayler had a right to proceeds** coming  
 4 from settlement of the fraudulent deed of  
 5 trust on CH Angelus I and CH Angelus II  
 6 property.

7 Mr. Rosenberg could not understand that Mr.  
 8 Gayler had no direct right to any of these  
 9 proceeds, nor did the bankruptcy estate have  
 10 standing in the state court action. Mr. Rosenberg  
 11 decided the law and facts shouldn't get into the  
 12 way of his attack on the Maclaw attorneys. I think  
 13 the only way to understand this is from the  
 14 summary and diagram below:

15 a. **CH Angelus** (referred to as CH Angelus I) has many investors and it is  
 16 entitled to \$582,000<sup>8</sup> from the title insurance settlement. Gayler claims to own a 50%  
 17 membership interest even though he walked away with  
 18 \$1.6MM of the unauthorized \$2.0MM loan proceeds. Thus,  
 19 \$291,000 of the settlement  
 20 proceeds is in dispute. Barrett  
 21 owned 30% (\$175,000).  
 22 Loerwald owned 10% (\$58,000)  
 23 and the Gayler Trust owned  
 24 10% (\$58,000). The issues to  
 25 be litigated in state court are: i)  
 26 who owns Barrett and  
 27 Loerwald's 40% because those  
 28 interests are related to Gayler's fraud upon Ch Angelus I; and ii) who gets the distribution to  
 29 Gayler's trust (which has been transferred to TGF Holdings).

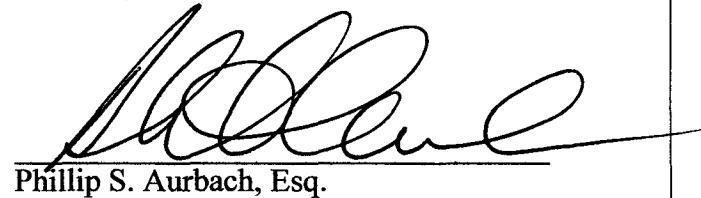


<sup>8</sup> I am using round numbers for ease of reference.

1                   b.        **CH Angelus II** has many investors and it is entitled to \$420,000<sup>9</sup> from the  
2 title insurance settlement. CH Pichon, Harlan and Groth are separate entities in which Mr.  
3 Gayler only owned a small percentage. He transferred his ownership of those entities as well as  
4 the Gayler Trust to TGF Holdings.

5                   c.        The state court litigation of the ownership rights and distribution of  
6 \$413,000 in proceeds is at issue and right now. Nothing can happen until Judge Nakagawa  
7 decides the Motion to Lift Stay. I have not been involved in the state court litigation that gave  
8 rise to the title insurance money since the estate has no interest other than if the Trustee were to  
9 win the fraudulent transfer litigation against TGF Holdings.

10                  Dated this 3rd day of September, 2013.



11                  Phillip S. Aurbach, Esq.  
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